IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63298-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JEFFREY ALLAN ZIERMAN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 12, 2010
	)	
	)	

Cox, J. — Jeffrey Zierman challenges his conviction for manufacturing methamphetamine, arguing that admission of the redacted contents of an anonymous 911 phone call violated his Sixth Amendment right to confrontation. He also claims that the redacted contents of the call were not relevant to any fact in issue and that they constituted hearsay. We hold that the redacted contents of the call were not testimonial and did not violate his Sixth Amendment right to confrontation. We also hold that this evidence was not hearsay. Assuming without deciding that the evidence was not relevant for the limited purpose for which it was admitted, the error was harmless. We affirm.

On January 22, 2006, Snohomish County Sheriff's Deputy James Upton was informed by dispatch of "an anonymous [911] complaint that an individual was moving tanks around in someone else's yard." After calling the informant

back to obtain more information and waiting for a backup officer to arrive, Deputy Upton traveled to the location described by the 911 caller about an hour after the dispatcher received the initial call. The residence was a single-wide mobile home on an approximately one-acre lot.

Deputy Upton knocked on the front door and spoke with the resident, Jeffrey Adcock, a renter. The deputy asked for permission to search the property and backyard shed, explaining that there had been "a report of somebody in [the] back yard," and "a 911 call stating there was a suspicious person moving things around." Adcock responded that he did not use the shed and that he had not given anyone permission to be on the property.

Deputy Upton received permission from Adcock to search the property and proceeded to an old shed that occupied a portion of the backyard about 10 to 20 feet behind the trailer. When Deputy Upton opened the shed door he was confronted by an overpowering chemical smell. He saw a man, later identified as Zierman, alone inside the shed. The shed also contained a burning hand torch, glass containers, PVC and plastic piping, a can of acetone, lithium batteries, two propane tanks, a bottle of aluminum jelly, and a five-gallon tank. Two glass jars, a large metal spoon, and a digital scale inside the shed contained liquid or residue.

After arresting Zierman, Deputy Upton notified the Regional Drug Task Force. The deputy waited for members of the task force to arrive and process the scene.

The State charged Zierman by amended information with manufacture of a controlled substance, a violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA). There was also another charge, which is not at issue in this appeal.

Prior to trial, Zierman moved for an order directing the State to provide the identity of the anonymous 911 caller. Zierman also moved to suppress all evidence discovered subsequent to the anonymous telephone call to police, arguing that the State had not established the reliability of the information provided by the anonymous caller. At the hearing on these motions, Deputy Upton confirmed that dispatch had received a 911 phone call reporting that an individual was moving tanks around in someone else's backyard. Deputy Upton also testified that, while not stated in his report, the caller reported that he suspected that the individual was Zierman. When Deputy Upton placed a follow-up call to the 911 caller, the individual expressed a desire to remain anonymous because of fear that Zierman would "do bad things to them."

The trial court denied both motions, concluding that the identity and reliability of the caller were not relevant because the investigating officer did not use the information to obtain a warrant. Rather, he used it to contact the resident of the property and obtain his permission to search the shed.

On the morning of trial, Zierman moved to exclude any mention of the anonymous 911 phone call, arguing that it was inadmissible hearsay and inflammatory. The State argued in response to the hearsay argument that it did

not intend to introduce evidence of the call for the truth of the caller's statement. Rather, the State explained that the evidence was relevant to explain why Deputy Upton was investigating Adcock's property. Zierman's trial brief also challenged the call on the basis that it was not relevant to any fact in issue. The court took the matter under advisement after asking some additional questions.

At trial, during direct examination of Deputy Upton, Zierman again objected to the admission of the 911 call on hearsay grounds. The court overruled the objection and gave a limiting instruction to the jury, stating that the 911 call was being introduced not for the truth of what the caller told the 911 dispatcher, but for the purpose of explaining why Deputy Upton went to Adcock's home and sought permission to search the shed.

At trial, the State presented evidence from members of the Snohomish County Sheriff's Office Regional Drug Task Force. The evidence established that the items found in the shed were all necessary for the distillation and production of methamphetamine. Moreover, the evidence established that all of the chemicals necessary for the various stages of methamphetamine production were present in the items found in the shed. A chemist from the Washington State Patrol Crime Lab testified that he performed a chemical analysis on each of the items confiscated from the shed and found all of the chemicals necessary for the various stages of methamphetamine production. He also found methamphetamine.

Zierman also testified at trial. He stated that on the date in question,

Adcock had asked him to come over and check out some suspicious activity on his property. Zierman testified that he entered Adcock's property because of this request and chased his dog into the shed mere minutes before Deputy Upton opened the shed door and discovered him.

Adcock testified at trial that he never gave Zierman permission to be on his property or in the shed.

The jury convicted Zierman as charged.

Zierman only appeals his VUCSA conviction.

CONFRONTATION CLAUSE

Zierman argues that the admission of the redacted contents of the anonymous 911 call violated his Sixth Amendment right to confrontation, contrary to the United States Supreme Court's ruling in Crawford v. Washington.[1] He also argues that this evidence was not relevant and constituted hearsay. We hold that the trial court did not abuse its discretion in admitting this evidence.

Under the Sixth Amendment, an accused has the right to confront witnesses bearing testimony against him.[2] In Crawford, the Supreme Court held that the admission of out-of-court testimonial statements violates a defendant's right under the confrontation clause unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.[3]

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[1] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[2] U.S. Const. amend. XI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

However, the court in Crawford specifically retained the rule of Tennessee v. Street[4] that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."[5]

This court has stated,

> There is no doubt that Washington decisions following Crawford recognize that "[w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no [c]onfrontation [c]lause concerns arise." "[E]ven testimonial statements may be admitted if offered for purposes other than to prove the truth of the matter asserted."[6]

In addition, "nontestimonial" hearsay is not subject to the confrontation clause and is admissible, subject only to the rules of evidence.[7]

The Supreme Court has not provided a comprehensive definition of what constitutes "'testimonial'" evidence.[8] But, as the Court explained in Davis v. Washington[9] statements made in the course of a police interrogation are

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[3] Crawford, 541 U.S. at 68.

[4] 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985).

[5] Crawford, 541 U.S. at 59 n.9, 60 (citing Street, 471 U.S. at 414).

[6] In re Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005) (footnotes omitted) (quoting State v. Mason, 127 Wn. App. 554, 566 n.26, 126 P.3d 34 (2005) and State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005), aff'd by Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)).

[7] State v. Pugh, 167 Wn.2d 825, 831-32, 225 P.3d 892 (2009) (citing Davis v. Washington, 547 U.S. at 821).

[8] Crawford, 541 U.S. at 68.

[9] 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

nontestimonial if they were made under circumstances objectively indicating that the primary purpose of the statement was "to enable police assistance to meet an ongoing emergency."[10] On the other hand, statements are testimonial if the circumstances "objectively indicate that there [wa]s no such ongoing emergency" and "the primary purpose of the [statement was] to establish or prove past events potentially relevant to later criminal prosecution."[11] This definition applies equally to statements made in response to questioning and to volunteered statements.[12]

The trial court's admission of evidence is reviewed for abuse of discretion.[13] Discretion is abused only if the trial court's "decision is manifestly unreasonable or is based on untenable reasons or grounds."[14]

This court reviews de novo alleged violations of the confrontation clause.[15]

Hearsay Exception

Zierman argues that admission of a redacted version of the anonymous 911 call violated the confrontation clause even though it was admitted for a non-

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[10] Id. at 822.

[11] Id.

[12] Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S. Ct. 2527, 2535, 174 L. Ed. 2d 314 (2009).

[13] State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995).

[14] State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003) (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

[15] State v. Tyler, 138 Wn. App. 120, 126, 155 P.3d 1002 (2007).

hearsay purpose and the court gave a limiting instruction. We disagree.

Here, the content of the 911 call was not admitted to prove the truth of the matter asserted. Rather, the trial court admitted the redacted content of that call to explain why Deputy Upton arrived at the subject property and sought permission from Adcock to search the backyard and shed. As this court has previously held, "[w]hen a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible."[16]

We also note that the court admitted a redacted version of the call with a limiting instruction to the jury. This limiting instruction, which jurors are presumed to follow, advised the jury of the limited purpose of the evidence.[17] Specifically, the court orally instructed the jury that the evidence was not being admitted for the truth of what the caller told the dispatcher, but for the purpose of explaining why the deputy went to Adcock's home and sought permission to search the shed.

Zierman argues that under our supreme court's decision in State v. Mason,[18] even if the 911 call was properly admitted for the non-hearsay purpose of explaining Deputy Upton's actions, the statement may still not survive a

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[16] State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005); see also State v. Lillard, 122 Wn. App. 422, 437, 93 P.3d 969 (2004) ("[T]he State did not offer [the informants'] statements to prove what the cardholders had said, but to show how [the detective] conducted his investigation.").

[17] Street, 471 U.S. at 416 n.6.

[18] 160 Wn.2d 910, 162 P.3d 396 (2007).

confrontation clause challenge. We agree with this principle, but conclude that it does not undercut admission of the evidence in this case.

In Mason, our supreme court noted that "[t]o survive a hearsay challenge is not, per se, to survive a confrontation clause challenge."[19] But the concerns raised by the supreme court in Mason are not present here.

In Mason, the following discussion preceded the above observation:

> The Court of Appeals reasoned that the statements repeated by [the detectives] were not offered for their truth and thus were not subject to the confrontation clause . . . [The defendant] challenges this proposition, arguing that statements admitted as "background" or "state of mind" hearsay exceptions violate the confrontation clause when they are in fact used for their truth by the jury or prosecutor. He argues the statements were, in spite of the court's limiting instructions, used to establish the truth of [the victim's] claims. [The defendant] correctly notes that courts ought to guard against any "backdoor" admission of inadmissible hearsay statements. The State, however, calls our attention to a parenthetical statement found in footnote 9 of Crawford: "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."
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> Certainly, Crawford and Davis require that we carefully examine the admission of every statement secured by the police primarily for investigative purposes. However, the Crawford Court also said, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence." Whether or not the United States Supreme Court would approve the introduction of [the victim's] entire testimonial story to explain the admission of exhibits or someone's state of mind, under one theory or another that the evidence was not offered for its truth is, at the very least, debatable. Courts use analytical tools such as whether the statements were or were not hearsay, or were exceptions to hearsay, or whether they were offered for their truth to determine if statements are testimonial. These tools may, like reliability, subject to judicial abuse the right of confrontation. Deciding which statements are testimonial, and which are not, may be difficult until the Supreme Court develops the definition of "testimonial" further.

[19] Id. at 922.

> However, we are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. ***To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge. . . .***
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> ***Our decision that a hearsay ruling was reasonable does not preclude deciding the statement was intended to establish a fact and that it was reasonable to expect it would be used in a prosecution or investigation; in other words, that it was testimonial***.[20]

It is clear from this discussion that courts should be concerned that an out-of-court statement admitted for a purpose other than the truth of the matter asserted must still pass muster under the confrontation clause. Thus, the question is whether the evidence here is testimonial, violating the prohibitions of that clause.

Testimonial Evidence

Zierman argues that the redacted contents of the 911 call were testimonial in nature. We disagree.

Deputy Upton testified at trial that he went to the property because "[d]ispatch had an anonymous complaint that an individual was moving tanks around in somebody else's yard."[21] Whether this evidence is testimonial is the issue.

Our supreme court recently applied the four part test outlined in Davis v. Washington for determining whether an out-of-court statement is testimonial: (1) whether the speaker is speaking of events as they are actually occurring or

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[20] Id. at 921-22 (emphasis added).

[21] Report of Proceedings (October 13, 2008) at 42.

instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.[22]

Here, with respect to the first prong of the test, there is no dispute that the caller was describing events as they happened, not describing past events.

Under the second prong, Zierman argues that "moving tanks around in someone else's yard" does not constitute an ongoing emergency. But in explaining what a "reasonable listener" would conclude is an ongoing emergency for purposes of confrontation clause analysis, our supreme court observed that:

> Courts have recognized that there are two ways in which an ongoing emergency may exist: first, ***when the crime is still in progress***, and second, when the victim or the officer is in danger, either because of the need for medical assistance or because the defendant poses a threat.[23]

This record reflects that the caller was relating events that he or she believed to be a crime in progress. We conclude that a reasonable listener would conclude that the caller was facing an ongoing emergency under the first prong of the above test for emergency.

The third prong requires that we decide whether the anonymous caller's

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[22] State v. Koslowski, 166 Wn.2d 409, 418-19, 209 P.3d 479 (2009) (citing Davis v. Washington, 547 U.S. at 827).

[23] Koslowski, 166 Wn.2d at 419 n.7 (emphasis added).

statements were necessary in order to resolve the then existing emergency or instead to learn what had happened in the past. The record reflects that the redacted statement admitted at trial was necessary to resolve the then existing emergency: a perceived crime in progress. It was necessary because it was designed to elicit a police response—in this case Deputy Upton's response to the scene and subsequent actions. The statements had nothing to do with anything in the past.

Finally, the last prong of the test is an inquiry into the formality of the statement. The greater the level of formality, the more likely the statement was testimonial.[24]

The redacted content of the brief 911 call was given by phone, apparently by someone who insisted on anonymity. These circumstances are far different from and much less formal than the circumstances discussed in Crawford.[25] As in Davis, the statements were made over the phone, not at the station house.[26] Moreover, like Davis, there appears to have been no series of questions by an officer-interrogator taping and making notes of the answers.[27] The brief phone call was made by someone wishing to remain anonymous and does not appear to have resulted in an interrogation by the 911 dispatcher. On

[24] Id. at 418-19.

[25] Davis v. Washington, 547 U.S. at 827 (citing Crawford, 541 U.S. 36).

[26] Id.

[27] Id.

these facts, the call does not rise to the level of formality that would prompt constitutional concerns in this case.

We conclude that the redacted contents of the 911 call were not testimonial. There was no violation of the confrontation clause in admitting the evidence.

To the extent that Zierman argues that Crawford was wrongly decided, we disagree. Our supreme court has consistently followed Crawford.[28] This court is bound by majority opinions of our supreme court.[29]

Relevancy

Zierman also argues that admission of the redacted contents of the 911 call was an abuse of discretion even if it was not testimonial and not hearsay. Specifically, he claims the evidence was not relevant to any issue at trial.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[30] The relevancy of evidence in a given case will depend on the circumstances of that case and the relationship of the facts to the ultimate issue.[31] "The threshold to admit relevant

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[28] In re Theders, 130 Wn. App. at 433; State v. Davis, 154 Wn.2d at 301, aff'd by Davis v. Washington, 547 U.S. 813.

[29] 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 578, 146 P.3d 423 (2006).

[30] ER 401.

[31] Id.

evidence is very low. Even minimally relevant evidence is admissible."[32]

On appeal, Zierman relies heavily on State v. Aaron.[33] He points out that he cited this case to the trial court in his motion in limine.

Aaron was an appeal to this court of a second degree burglary conviction.[34] At issue was whether the trial court abused its discretion in admitting evidence related by a 911 dispatcher to a police officer who testified at trial and in refusing to grant a limiting instruction for that evidence.[35]

The evidence that was the subject of dispute was that the officer was told by the 911 dispatcher that the burglary suspect used a blue jeans jacket to push through some bushes to retrieve stolen property.[36] A blue jeans jacket was found in a car that Aaron occupied just before his arrest.[37] Stolen goods were also found in the car.[38]

At trial, Aaron challenged as hearsay the police officer's testimony that the dispatcher told him about the blue jeans jacket.[39] The State responded that the truth of what the dispatcher told the officer was not at issue, only the officer's

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[32] State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

[33] 57 Wn. App. 277, 787 P.2d 949 (1990).

[34] Id. at 278.

[35] Id. at 278-79.

[36] Id. at 279.

[37] Id. at 278.

[38] Id.

[39] Id. at 279-80.

state of mind in explaining why he acted as he did.[40] After initially reserving ruling on the question, the trial court overruled the hearsay objection during trial and refused to give a limiting instruction.[41]

This court reversed on appeal, reasoning that because the legality of the search and seizure preceding Aaron's arrest was not at issue, the officer's state of mind was also not at issue.[42] Thus, the officer's state of mind was not relevant to any fact in issue.[43] This court went on to say that the true purpose of the evidence was "solely to suggest to the jury that the jacket containing [the stolen property] belonged to Aaron."[44] After further discussion rejecting the State's arguments for admission, this court concluded that if it had been necessary to relate historical facts to the jury, it would have been sufficient for the officer to testify that he acted on "information received."[45] The court went on to hold that the failure to give a limiting instruction to the jury was prejudicial and not harmless.[46]

Washington courts have concluded in other cases that an out-of-court statement may be admitted for the relevant non-hearsay purpose of explaining

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[40] Id.

[41] Id. at 280.

[42] Id.

[43] Id.

[44] Id.

[45] Id. at 281.

[46] Id.

"why an officer conducted an investigation."[47] On the other hand, Zierman cites a number of cases where Washington courts have concluded that the admission of an out-of court statement for the non-hearsay purpose of explaining a police officer's reason for conducting an investigation was an abuse of discretion either because the statement was prejudicial or because the officer's reason for initiating the investigation was not relevant.[48]

On this record, it appears that Zierman raised this relevancy argument below, but that it was not developed to the extent now argued on appeal. For example, the court was not asked to limit this officer's testimony to a statement that he acted on "information received," as suggested in Aaron. In any event, we need not decide whether the content of the redacted 911 call met the threshold test of relevancy. Assuming without deciding that it did not, any error in admission of the evidence was harmless under the nonconstitutional standard.

When an evidentiary error is not of constitutional magnitude, we must determine, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred.[49] "The improper admission of

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[47] Iverson, 126 Wn. App. at 337 (admission of woman's self-identification for purpose of explaining officer's subsequent investigation relevant); State v. Post, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990), aff'd, 118 Wn.2d 596, 826 P.2d 172 (1992) (admission of phone call identifying defendant not hearsay because it was not offered for its truth, but rather to establish why the detective acted as he did).

[48] See State v. Lowrie, 14 Wn. App. 408, 412-13, 542 P.2d 128 (1975); State v. Stamm, 16 Wn. App. 603, 611, 559 P.2d 1 (1976); Aaron, 57 Wn. App. at 280-81; State v. Wicker, 66 Wn. App. 409, 412, 832 P.2d 127 (1992); State v. Edwards, 131 Wn. App. 611, 614-15, 128 P.3d 631 (2006).

evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."[50]

Zierman was convicted of manufacturing methamphetamine. The elements of that crime are that Zierman manufactured methamphetamine on the day he was arrested and that he knew the substance manufactured was methamphetamine.

As discussed above, the State introduced evidence at trial that Zierman was arrested in a shed containing all the equipment necessary to manufacture methamphetamine, and that the equipment present in the shed contained all of the chemical elements necessary to manufacture methamphetamine. The State also presented evidence of an overpowering chemical smell and the presence of burning heat torch on the floor.

Zierman argues that the admission of the call was not harmless error because its admission damaged his defense—that he arrived at the shed only minutes before his arrest. It appears that he contrasts this with the fact that Officer Upton arrived on the scene about an hour after the 911 call, suggesting that someone had been in the backyard for over an hour. But Zierman did not contest any of the evidence against him: his presence in the shed, the presence of the materials and chemicals necessary to manufacture methamphetamine, the overwhelming smell of chemicals, or the burning torch on the floor. Instead, he

[49] State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

[50] State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

argued that he was not really associated with the shed but was there only momentarily at Adcock's invitation. The burning torch on the floor of the shed undercuts this claim. Further, Zierman's testimony conflicted with the testimony of both Adcock and Deputy Upton. Credibility determinations by the jury are not subject to our review.[51]

Given the above posture of the case, a rational trier of fact would, within reasonable probabilities, have concluded that Zierman was manufacturing methamphetamine in the shed based on the totality of the evidence, regardless of whether or not the trial court admitted the redacted 911 call.

We also note that the trial court issued an unchallenged and proper limiting instruction, directing the jury not to consider the 911 call as evidence that Zierman committed a crime. The court further redacted any mention of Zierman by the 911 caller. These actions minimized any undue prejudice that admission of the complete contents of the call might have had. Moreover, the State argued consistently with the court's limiting instruction and made no argument related to the 911 call.

For these reasons, any error in admitting this evidence was harmless.

We affirm the judgment and sentence.

[51] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Cox, J.

WE CONCUR:

Leach, A.C.J.

Ellington, J.